

SERVED: August 10, 2007

NTSB Order No. EA-5307

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 9<sup>th</sup> day of August, 2007

_____	)	
MARION C. BLAKEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket No. SE-17647
v.	)	
	)	
MICHAEL S. JOLLY,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr. in this matter,<sup>1</sup> issued following an evidentiary hearing held on May 31, 2006. The Administrator's order suspended respondent's airline transport pilot (ATP) certificate for 30 days, based on alleged

<sup>1</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

violations of 14 C.F.R. §§ 91.13(a),<sup>2</sup> 91.139(c),<sup>3</sup> and 99.7.<sup>4</sup> The law judge rejected respondent's affirmative defense of reasonable reliance, and found that the Administrator had fulfilled her burden of proving that respondent violated the aforementioned regulations, as charged. The law judge affirmed the Administrator's suspension of respondent's ATP certificate for a period of 30 days. We deny respondent's appeal.

On January 9, 2006, the Administrator issued an order suspending respondent's ATP certificate for 30 days. In the order, the Administrator alleged that on July 2, 2005, respondent violated NOTAM FDC 3/2126 when he was acting as pilot-in-command (PIC) of a Hawker Siddeley DH-125 in the vicinity of Leesburg, Virginia, by entering the ADIZ without complying with the requirements of the NOTAM.<sup>5</sup> As a result, the

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<sup>2</sup> Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

<sup>3</sup> Section 91.139(c) states that when a Notice to Airmen (NOTAM) has been issued under this section, no person may operate an aircraft within the designated airspace "except in accordance with the authorizations, terms, and conditions prescribed in the regulation covered by the NOTAM."

<sup>4</sup> Section 99.7 requires each person operating an aircraft in the Air Defense Identification Zone (ADIZ) to comply with the Administrator's special security instructions in the interest of national security.

<sup>5</sup> NOTAM FDC 3/2126, which became effective on March 18, 2003, prohibits entry into the "Washington DC metropolitan area Air Defense Identification Zone (DC ADIZ)," unless aircraft

Administrator alleged that respondent had violated 14 C.F.R. §§ 91.13(a), 91.139(c), and 99.7.

The case proceeded to a hearing before the law judge on May 31, 2006, at which the Administrator presented the testimony of five witnesses, and provided thirteen exhibits. The Administrator first called Mr. Gary Bobik, an ATC and NOTAM procedures specialist for the Administrator, who testified that NOTAM FDC 3/2126 was in effect at the time of the alleged violations, and explained the requirements of the NOTAM. Mr. Bobik opined that the area that NOTAM FDC 3/2126 covers is the busiest area of restricted airspace in the country. Tr. at 42. The Administrator also provided the testimony of Ms. Dawn Ramirez, a support specialist for quality assurance at the FAA, who investigates operations within restricted airspace areas. Ms. Ramirez testified that, where an operator is flying under instrument flight rules (IFR), he or she must file *and activate* their IFR flight plan prior to entering the area that NOTAM FDC 3/2126 covers (Tr. at 75, 83, 88), and that respondent did not comply with this requirement (Tr. at 76). The Administrator

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operators fulfill certain requirements, including establishing two-way radio communications with air traffic control (ATC), obtaining a discrete transponder code, and filing and activating an approved flight plan prior to entering the DC ADIZ. Exh. A-1 at 2-3.

also called Mr. Mark Olsen, who is the investigation manager for the Administrator's Air Traffic Safety Investigations Office, to testify; Mr. Olsen introduced an exhibit at the hearing that used radar data to illustrate the flight path of respondent's aircraft at the time that respondent allegedly entered the ADIZ. Tr. at 164; Exh. A-10. In addition, the Administrator provided the testimony of Mr. Richard Booth, the deputy director of Command Control Communications at Customs and Border Protection (CBP), who discussed the standard procedure in which CBP and other Federal agencies engage when responding to unauthorized incursions into restricted airspace, and who testified that unauthorized entries into restricted airspace result in endangerment. Tr. at 197. Finally, the Administrator called Ms. Kathleen Martin, the aviation safety inspector from the Harrisburg Flight Standards District Office who investigated respondent's alleged violation of NOTAM FDC 3/2126. Ms. Martin spoke with respondent regarding the event, and testified that respondent should have been squawking a different transponder code than the one he was using. Tr. at 222. Ms. Martin also testified that respondent never mentioned his co-pilot, and that she did not inquire about his co-pilot. Tr. at 245-47. Ms. Martin testified that respondent had an independent obligation to comply with the requirements of NOTAM FDC 3/2126.

In response to the Administrator's case, respondent testified that he began the flight in question under visual flight rules (VFR), because he could not obtain clearance for his IFR flight plan in a timely manner, and that the flight in question was the first flight in which he and his co-pilot had flown in the area under VFR. Tr. at 270, 277, 297. Respondent testified that he knew that his aircraft was nearing the ADIZ covered by NOTAM FDC 3/2126, and that he would need to activate his IFR flight plan prior to entering the restricted airspace. Tr. at 252. Respondent also testified that he knew that the Administrator's Potomac facility had not given clearance to his aircraft to enter the restricted airspace. Tr. at 253, 277. Respondent testified that he delegated "total responsibility" for the navigation of the aircraft to his co-pilot, Mr. Michael Gaylor. Tr. at 270. Respondent testified that he could hear some ATC communications in which Mr. Gaylor engaged on the flight, but not all communications (Tr. at 302, 306-307), and that he did not ask Mr. Gaylor questions during the flight about radio communications (Tr. at 303-304).

At the conclusion of the hearing, the law judge affirmed the Administrator's complaint, holding that the Administrator had proven that respondent entered the ADIZ without complying with the requirements of NOTAM FDC 3/2126. Initial Decision at

357-58. The law judge also held that respondent had not met his burden of establishing that he had reasonably relied upon his co-pilot to fulfill the requirements of NOTAM FDC 3/2126 while respondent was operating the aircraft. Initial Decision at 359-360. In particular, the law judge concluded that respondent's failure to provide any evidence other than his own testimony resulted in his finding that respondent had not fulfilled his burden. As such, the law judge affirmed the Administrator's complaint and order of suspension of respondent's ATP certificate.

On appeal, respondent argues that the Administrator did not provide respondent with an opportunity to attend a conference in accordance with 49 U.S.C. § 44709(c),<sup>6</sup> and that dismissal of the Administrator's order is appropriate, given the statutory requirement of § 44709(c). In the alternative, respondent argues that he reasonably relied upon his co-pilot to ensure compliance with NOTAM FDC 3/2126, and that such reliance functions to absolve him of the violations that the Administrator has charged. The Administrator contests both of

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<sup>6</sup> Title 49 U.S.C. § 44709(c) requires the Administrator to provide the certificate-holder with "an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked."

respondent's arguments, and urges us to affirm the law judge's decision.

With regard to violations of 49 U.S.C. § 44709(c), we have previously held that § 44709(c) confers a right to an *opportunity* to attend such a conference, but not an unqualified *right*. Administrator v. Zink, NTSB Order No. EA-5262 at 4 (2006) (quoting Administrator v. Windwalker, NTSB Order No. EA-4638 (1998), and affirming that the law does not require more than an opportunity for a conference). In the case at hand, the Administrator provided evidence that her counsel provided respondent with an opportunity for an informal conference to discuss the charges.<sup>7</sup> In addition, at the administrative hearing, respondent's counsel stated that an attorney from his law firm and the Administrator's counsel corresponded about an informal conference, and conceded that the Administrator's counsel asked the court for a continuance of the case in order to hold a conference. Tr. at 15-17. Respondent's counsel declined the offer for the informal conference (Tr. at 18), and argues that his law firm did not know that the Administrator had

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<sup>7</sup> Administrator's Reply Br., Attach. 3 at 1, 4 (Administrator's Form 2150-11, entitled, "Information With Respect to Notice of Proposed Certificate Action"); see also Tr. at 315 (Administrator's counsel's offer to provide another FAA attorney's testimony regarding the conversations that the attorney had with respondent's counsel regarding the scheduling of an informal conference).

already issued her order of suspension at the time that respondent requested the informal conference (Tr. at 14). Respondent does not provide any evidence with his appeal brief to dispute the Administrator's argument and accompanying evidence showing that the Administrator's counsel provided respondent with the opportunity to confer. In addition, respondent's counsel objected to the Administrator's proffer of testimony regarding the correspondence that had occurred concerning the informal conference, and the law judge sustained respondent's objection. Tr. at 315-18. Respondent's counsel's argument that he was unaware that the Administrator had issued her order of suspension at the time that his co-counsel requested the conference is not persuasive, because a respondent's counsel is responsible for staying abreast of the status and developments of their client's case. Overall, we decline to dismiss this case on the basis that the Administrator did not fulfill her duty of providing respondent with an opportunity for an informal conference, in accordance with 49 U.S.C. § 44709(c).

Respondent also argues that he reasonably relied upon his co-pilot, as second-in-command, to oversee all communications with ATC, and to obtain clearance to enter the ADIZ. Respondent's co-pilot, Mr. Gaylor, had more experience with ATC

communications and had previously flown with respondent. Tr. at 262-64, 309. As such, respondent testified that he trusted Mr. Gaylor to ensure that the aircraft remained outside the ADIZ. Tr. at 267. Respondent also testified that he did not hear the communication from ATC in which the air traffic controller stated, "[Y]ou realize you're in the ADIZ right[?]," and in which Mr. Gaylor responded, "[Y]es sir we realize that." Tr. at 279-280, Exh. A-3 at 1-2. Overall, respondent argues that the Board's doctrine of reasonable reliance should absolve him of his failure to comply with the NOTAM.

In presenting this "reasonable reliance" argument, respondent cites the principle we articulated in Administrator v. Fay & Takacs, NTSB Order No. EA-3501 (1992), wherein we held that, "[i]f ... a particular task is the responsibility of another, if the [pilot-in-command] has no independent obligation (e.g., based on the operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found." Id. at 4 (emphasis in original).

Respondent argues that the law judge made erroneous factual findings in his initial decision,<sup>8</sup> and did not explain why

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<sup>8</sup> We note that respondent does not explain how an alternative resolution of factual determinations such as whether the ADIZ

additional evidence, such as Mr. Gaylor's testimony, was so critical to the case.

We find that respondent's argument regarding the doctrine of reasonable reliance is not persuasive. We have previously held that the doctrine of reasonable reliance is a narrow one.<sup>9</sup> The doctrine may apply to cases "involving specialized, technical expertise where a flight crew member could not be expected to have the necessary knowledge." Fay & Takacs, supra, at 4. While we recognize that it is certainly necessary for operators to divide their duties and responsibilities in order to operate the aircraft in the safest, most effective manner, respondent has not established that his reliance on Mr. Gaylor

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includes Camp David, and whether respondent initially departed from Baltimore, rather than York, Pennsylvania, would have changed the law judge's ultimate conclusion.

<sup>9</sup> See Administrator v. Doreen, NTSB Order No. EA-4778 at 2 (1999) (stating that Fay & Takacs did not apply because respondent had an independent obligation to repeat clearance out loud, and because respondent had the ability to ascertain the correct clearance); Administrator v. Nutsch, NTSB Order No. EA-4148 (1994), aff'd 55 F.3d 684 (D.C. Cir. 1995) (respondent did not satisfy the duties of a reasonably prudent pilot when he assumed co-pilot would correctly enter altitude); Administrator v. Buboltz, NTSB Order No. EA-3907 at 2 (1993) (finding that respondent did not satisfy Fay & Takacs reliance test because respondent had reason to question the first officer's characterization of a clearance, and because respondent had the ability and opportunity to ascertain whether his flight was cleared); Administrator v. Papadakis, 2 NTSB 2311, 2313 (1976) (finding that respondent should have inquired about his first officer's programming of altitude alert digital setting).

to ensure compliance with the NOTAM was reasonable. First, respondent knew that he was adjacent to the ADIZ, and knew that it was incumbent upon him to activate his IFR flight plan or obtain clearance to enter the ADIZ prior to entering the restricted airspace. Nevertheless, respondent did not ensure that he had fulfilled this duty. Moreover, respondent confirmed that he had never operated an aircraft in the area under VFR conditions, but respondent did not question Mr. Gaylor to ensure that they were operating in the aircraft in compliance with the requirements of the NOTAM. Respondent also has not met the "reasonable reliance" test of Fay & Takacs, supra, because respondent has not established that he did not have the ability to ascertain whether Mr. Gaylor had brought them into compliance with the NOTAM. The fact that respondent had never operated an aircraft near the ADIZ under VFR conditions suffices to require him to question whether Mr. Gaylor had fulfilled respondent's duties on behalf of respondent. Finally, we note that the Federal Aviation Regulations have established that the PIC of an aircraft is ultimately responsible for the operation of the aircraft, 14 C.F.R. § 91.3.<sup>10</sup> Overall, we find that respondent

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<sup>10</sup> We also note that we will defer to the Administrator's interpretation of her own regulations, unless her interpretation is arbitrary, capricious, or not in accordance with the law. Hinson v. Nat'l Transp. Safety Bd., 57 F.3d 1144, 1151 (D.C.

has not met his burden of establishing that the doctrine of reasonable reliance excuses his failure to comply with the provisions of the NOTAM.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The 30-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>11</sup>

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

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Cir. 1995).

<sup>11</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).